72-364

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-364

DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION for and on behalf of the President of the Union of India,

Petitioner,

—against—

S.S. MARU (ex RIVERHEAD, ex THEOKEETOR), her engines, boilers, etc. and LUARCA CIA NAV. S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1972

No. .....

DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION for and on behalf of the President of the Union of India,

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S.S. MARU (ex RIVERHEAD, ex THEOKEETOR), her engines, boilers, etc. and LUARCA CIA NAV. S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Second Circuit:

The petitioner, the Director General of the India Supply Mission for and on behalf of the President of the Union of India (hereinafter referred to as "India") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it affirms an order and judgment of the United States District Court for the Southern District of New York, dismissing the petitioner's two causes of action for cargo damage and for reimbursement for salvage expenses, and which granted judgment in favor of the respondent Luarca Cia. Nav. S.A. (hereinafter referred to as "Luarca") on its counterclaim for General Average contribution.

Opinion Below

The opinion of the District Court is unreported as yet, and that of the Court of Appeals is reported at 459 F.2d 1370 (1972). Copies of these opinions are appended hereto at pages 1a to 15a and 18a to 29a, respectively.

Jurisdiction

The order of the Court of Appeals denying petitioner's petition for rehearing *en banc* was entered on June 2, 1972 (pages 31-32a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the holding of the Second Circuit Court of Appeals below, which conflicts with the Fifth Circuit, which, for the first time in any reported case, interprets the intent of Congress in enacting the Load Line Act (46 U.S.C. §85 *et seq.*) as allowing a vessel owner the right to willfully overload its vessel, and, at the same time, recover from cargo, Salvage and General Average expenses accruing as the result of a stranding casualty to the overloaded vessel, shall be the law of the land?

2. Whether the rule enunciated by this Court in *The PENNSYLVANIA,* 86 U.S. 125 (1874), requiring a violator of a maritime safety statute to bear the burden of proving that its violation, "could not have

been a cause" of the ultimate maritime casualty, is applicable to a contract of carriage governed by the provisions of the Carriage of Goods by Sea Act (46 U.S.C. §1300 *et seq.*)?

Statutes Involved

1. The United States Load Line Act (46 U.S.C. §85, *et seq.*) provides in part:

"§85c. *Vessels so loaded as not to submerge lines or marks*

It shall be unlawful for any vessel . . . to be so loaded as to submerge, in sea water, the load line or lines marked pursuant to said sections and to the regulations established thereunder applicable to her voyage; or so as to submerge under like conditions the point where such load line or lines ought to be marked pursuant to the provisions of said sections and of the regulations established thereunder; or so as in any manner to violate the said regulations."

* * * * *

"§85g. *Penalties for violations of sections 85-85g; seizure of vessels*

(a) The owner and/or master of any vessel . . . shall be liable to the United States in a penalty not to exceed $1,000 whenever the vessel is found operating, navigating, or otherwise in use upon the navigable waters of the United States in violation of the provisions of such sections or the regulations established thereunder, or whenever the vessel, if a vessel of the United States, is found operating, navigating, or otherwise in use upon the high seas in violation of the provisions of such sections or the regulations established thereunder. Each day a vessel is in violation of the provisions of such sections shall constitute a separate offense."

2. The United States Carriage of Goods by Sea Act (46 U.S.C. §1300, *et seq.*) provides, in part, as follows:

"§1303. *Responsibilities and liabilities of carrier and ship—Seaworthiness*

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

• • • • •

"§1304. *Rights and immunities of carrier and ship—Unseaworthiness*

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied . . . . Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

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(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;"

• • • • •

Rules Involved

Rules "A", "C" and "D" of the York/Antwerp Rules of 1950 provide:

"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

• • • • •

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average."

• • • • •

"The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average."

Statement of the Case

The petitioner-India contracted[1] with the respondent vessel owner-Luarca to transport a quantity of rice from a United States port to ports in India. The respondent loaded

[1] The parties contracted by a voyage Charter Party which provided for the application of the U.S. Carriage of Goods by Sea Act (46 U.S.C. § 1300 *et seq.*) as regards cargo damage, and for the York/Antwerp Rules of 1950 and for a "New Jason Clause" as regards Salvage and General Average contribution (*See:* Circuit court opinion at 4a and contract at Joint Appendix, Vol. II, at p. 425a.

its vessel and sailed for India via the Bahamas for bunker fuel for the projected trans-Atlantic voyage. The vessel sailed from the loading port, took on fuel from a barge off the Bahamas, and later stranded in shallow waters off Freeport Island. Both the District and Circuit court opinions found that the respondent had supplied the vessel with a chart for the area of the strand which was 20 years out-of-date, and had also overloaded its vessel by 670 tons (equivalent to 13 inches of draft,[2] at the time it stranded.[3] After the stranding, the vessel's Master attempted to refloat and free his vessel by discharging a quantity of 984 long tons of fuel and water, but to no avail.

Subsequently, the Master was forced to hire professional salvors, and they refloated the stranded vessel after removing only 511 tons[4] of cargo from the stranded vessel to a lightening vessel. Eventually these salvors received an Award and the petitioner was obliged to pay cargo's proportional share ($146,072.) and the petitioner sued the respondent for reimbursement for the monies the petitioner paid the salvors and also sued to recover damages for cargo

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[2] The "loadline" is the line defining the maximum mean draft to which a vessel may be lawfully submerged. The "draft" of a vessel is the distance from the bottom of the keel to the water line. The mean draft is the average of the forward and aft draft readings (46 C.R.F. § 43.05-1 (1963)).

[3] See Circuit and District court opinions at 7a and 25a.

[4] If the stranded vessel had not been 670 tons overloaded, no salvage expenses would have become necessary, since it only took the discharge of 511 tons of cargo to refloat her and the expense and length of the salvage operation would not have been as great. While reference was made in the Circuit Court opinion to the salvors' use of beach gear and winches, no proof was ever submitted at trial that this gear actually was used to pull the vessel. The only testimony re the salvage operation is contained in the testimony of the Salvage Master (Joint Appendix, Ex. 6, pp. 1-60). *Nowhere* was there any factual basis for this Circuit's conclusions.

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contamination suffered during the voyage. The respondent in its Answer interposed a counterclaim declaring its vessel's stranding a General Average incident and seeking cargo's contributory share of General Average contribution from petitioner.

The Decision of the District Court

In its opinion, the trial court below (18a to 29a) found that the respondent failed to exercise due diligence to make its vessel seaworthy in two separate respects. Firstly, the carrying vessel had aboard charts for the area of the strand which were "so old and inaccurate as to be practically worthless" (22a). Despite the Master's clear log admissions,[8] the District Court held that the Master navigated visually and did not refer to the chart until after the strand and refused to hold the respondent shipowner liable. This logic, if accepted by this Court, will now have the net effect of permitting a vessel owner to put his ship to sea with grossly outdated navigational gear and to avoid liability by simply claiming ignorance of any unseaworthy data. The District Court also found the stranded vessel to be unseaworthy in that it "was overloaded at the time of the stranding by 670 tons and she was 13 inches deeper in the water than she should have been" (25a). The court found this to be a criminal violation under the U.S. Load Line Act (46 U.S.C. §85, *et seq.*) and concomitantly applied

[8] The vessel's Master admitted his use of the out-dated charts aboard his vessel in his deck log book as follows:

"0800 Wind NE4. Sea moderate, moderate swell. Ship's head 305. Ship does not move at all. *I rechecked* [the] *ship's position by taking bearings of landmarks and I noticed that something must be wrong with my charts as the position according to the bearings shows to be ¾ of a mile away from the 20 fathoms curve.*" (Emphasis added.)

the rule of *The PENNSYLVANIA*[*] case (86 U.S. (19 Wall) 125, 136 (1874)). The court concluded, however, despite the fact that no proof to the contrary was submitted by the respondent (Opinion, 10a, at footnote 5), that since the water was too shallow, the violation was of no matter and held for the respondent-criminal violator on the petitioner's causes of action and additionally awarded the respondent-vessel owner General Average contribution.

The Decision of the U. S. Circuit Court of Appeals

The Circuit Court in affirming the lower court decision held, for the first time in any reported case, that Congress somehow never intended the United States Load Line Act (46 U.S.C. §85, *et seq.*) to apply to a grounding casualty (11-13a). Concomitantly, it held the rule of *The PENNSYLVANIA* case (86 U.S. 125 (1874)) did not apply as well. Additionally, there was a division of authority within

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[*] This Court held as follows:

"... the burden rests upon the ship of showing not merely that her fault might not have been one of the causes [of the disaster] or that it probably was not, *but that it could not have been.* Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis added)

The rule in *The Pennsylvania* which initially was applied to collision cases has been expanded by the courts to apply to all types of maritime casualty situations in which a maritime statute has been violated. Situations involving the application of *The Pennsylvania* rule to matters other than collisions include: *Richelieu & Ontario Navigation Co.* v. *Boston Marine Insurance Co.*, 136 U. S. 408, 422 (1890) (Rule applied to a stranding); *Waterman Steamship Corporation* v. *Shipowners & Merchants Towboat Co.*, 199 F.2d 600 (9th Cir. 1952) (Rule applied to salvage claim where master was incompetent); *Petition of Long*, 439 F.2d 109 (2nd Cir. 1971) (Rule applied to a foundering vessel); *In the Matter of the Complaint of Seaboard Shipping Corp.*, 449 F.2d 132 (2nd Cir. 1971) (Rule applied to death case); *Pittsburgh Steamship Co.* v. *The Atomic*, 107 F.Supp. 631 (D. C. Mich. 1952) (Rule applied to a berthing).

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the panel as to whether *The PENNSYLVANIA* rule was applicable to a contract of Charter Party which incorporated the United States Carriage of Goods by Sea Act (46 U.S.C. §1300, *et seq.*).[7]

The Court cited legislative history to arrive at its conclusion that the *sole* intent of the Load Line Act was to prevent only marine disasters resulting from overloading where "lack of maneuverability and inadequate free-board in heavy seas" would result. The Court concedes that an overloaded vessel will sit lower in the water and reasons that "obviously the lower the ship is in the water, the more likely it will run aground in shallow water." It concluded, however, that a stranding under these circumstances "would be primarily due to negligent navigation" (12-13a). How the Court arrived at this conclusion is not clear, but it seems to follow that all groundings, according to the Court, are *per se* attributable to negligent navigation.

[7] Circuit Court opinion at 11a at footnote 6.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1.

Under Rule 19 of this Court, grounds for the issuance of a writ of certiorari will lie where there is a conflict between the decisions of several United States Courts of Appeal or when an important question of federal law has not been settled by this Court.

(a) *Conflict Between the Fifth and Second Circuits*

The Fifth Circuit in *Andros Shipping Co.* v. *Panama Canal Company*, 184 F.Supp. 246, *aff'd.* 298 F.2d 720 (1962) reached a decision which is completely in conflict with the decision of the Second Circuit below. In *Andros* a vessel owner overloaded its vessel in violation of the International Load Line Convention[8] of which the United States is also a signatory (*See:* 47 Stat. 2228; *Malloy's Treaties & Conventions*, Vol. 4, 1923-37, at pp. 5287-5349). The District Court (184 F.Supp. 246, 258) applied the rule of *The PENNSYLVANIA*[9] and required the violating vessel owner to prove that its statutory violation could not have been a cause of the stranding of the overloaded vessel. This holding as affirmed by the Fifth Circuit Court of Appeals[10] is exactly opposite to the holding of the Second Circuit[11] in

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[8] While the Andros Shipping case did involve a Canadian loadline statute, all loadline statutes of all seafaring countries are identical as per the International Loadline Convention (*See*: *The VESTRIS*, 60 F.2d 273, 279-80 (S.D. N.Y. 1932); *The DENALI*, 112 F.2d 952 (5th Cir. 1940).

[9] 184 F.Supp. 246, 258 (D.C. Canal Zone 1960).

[10] 298 F.2d 720 (1962).

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the instant case and the conflict should be resolved by this Court.

(b) *The Intent of Congress Under the Load Line Act*

An additional grounds for the allowance of a writ of certiorari is the fact that a federal appellate court has now held, for the first time in any reported case, that Congress never intended to prevent vessel owners from grossly overloading their vessels where the overloaded vessel eventually strands[12] in shallow waters. The net result of the Second Circuit's "court-made" amendment to the Load Line Act is to read into an exception which was never provided for by the legislators when the Act was passed by Congress in 1930. A vessel owner may now endanger its cargo and crew and leave any United States port overloaded and be *rewarded* for such wanton acts by recovering General Average and Salvage contribution from cargo when its overloaded vessel strands. When Congress enacted the Load Line Act strandings were the very type of casualty that the Act sought to prevent against. The Second Cir-

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[11] The Second Circuit reasoned that since the vessel owners in the *Andros* case were guilty of a number of statutory violations, including overloading, the case is distinguishable. This argument obviously ignores the fact that the Load Line Act and *The PENNSYLVANIA* rule were specifically applied and discussed by the Fifth Circuit. The fact that other statutory violations were found to have existed still does not negate the specific findings on the legal consequences of overloading.

[12] "Stranding" is defined as "the driving or running aground of a vessel" (*Int'l. Maritime Dictionary*, 2d Ed., p. 797). *See also:* W. Winter, *Marine Insurance* (3d Ed. 1952), which states, at p. 216:

> "The decisions clearly indicate that, to constitute a stranding, there must be such a taking of the bottom as results in the complete stoppage of the movement of the vessel. . . ."

This is precisely what happened under the facts of the instant case.

cuit opinion in its decision cites legislative history[13] which speaks to the very evil of pre-loadline stranding disasters.

Additionally, the original intent of Congress is *immaterial.* In *Kernan* v. *American Dredging,* 355 U.S. 426, 438 (1958) this Court held:

> ". . . the basis of liability is a violation of statutory duty without regard to whether the injury flowing from the violation was the injury the statute sought to guard against."

If the Fifth Circuit rule had been applied and the Load Line Act was held relevant to the issue of the petitioner's causes of action, *The PENNSYLVANIA* rule should have been applied to shift the burden to the petitioner to overcome the presumption of causation (*The New York Marine No. 10,* 109 F.2d 564, 566 (2d Cir. 1940) cited with approval in *Petition of Long,* 439 F.2d 109, 113 (2d Cir. 1971).

(c) *Conflict Within the Second Circuit*

At the present time two different panels within the Second Circuit have given two conflicting decisions on the legal issue of whether or not the rule of *The PENNSYLVANIA,* 86 U.S. 125 (1874) is applicable where the underlying contract of carriage is governed by the provisions of the U.S. Carriage of Goods by Sea Act (46 U.S.C. §1300 *et seq.*). One panel in *Petition of Long,* 439 F.2d 109, 113

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[13] "Mr. LaGuardia. I will say that the decrease in total loss of vessels in the British registry was 50 per cent after the passage of the Plimsoll load line. The losses—that is, total losses of ships—in the reports are classified in four subdivisions: Founderings, *strandings,* collisions, and other causes." (70 Cong. Rec. 3962-63, 1929) (Emphasis added.)

(2nd 1971) has applied the rule to a violation of the Load Line Act and the panel in this case has refused to accept this ruling even though the plaintiff and contract are identical. Further, the petitioner has sought by petition to have this conflict resolved by a re-argument *en banc* without success (31-32a).

CONCLUSION

The petition should be granted and the judgment of the Second Circuit Court of Appeals should be reversed.

Respectfully submitted,

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August 30, 1972

Opinion of the United States Court of Appeals

FOR THE SECOND CIRCUIT

[Footnotes by the Court]

No. 587—September Term, 1971.

(Argued March 21, 1972 Decided April 28, 1972.)

Docket No. 71-2177

DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION for and on behalf of the President of the Union of India,

Plaintiff-Appellant,

—against—

S.S. MARU (ex RIVERHEAD, ex THEOKEETOR), her engines, boilers, etc. and LUARCA CIA. NAV. S.A.,

Defendant-Appellee.

Before:

HAYS, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from a judgment entered in the District Court for the Southern District of New York, Edward C. McLean, *Judge,* dismissing appellant's claims for cargo damage and for reimbursement for amounts paid to a professional salvor and granting judgment for appellee on its counterclaim to recover appellant's share of a General Average adjustment of expenses other than salvage.

Affirmed.

Opinion of the United States Court of Appeals

MULLIGAN, *Circuit Judge*:

Appellant, the Director General of the India Supply Mission (Mission) appeals from a judgment of the United States District Court, Southern District of New York, Judge Edward C. McLean, dismissing two causes of action: (1) for damages in the sum of $6,234.11 for a shortage in delivery and contamination of plaintiff-appellant's cargo of rice; (2) for reimbursement for cargo's proportional share of contribution to a third party salvor in the sum of $146,072.64. The appellant also appeals from the judgment of the District Court awarding the defendant-appellee Luarca Cia. Nav. S.A. (Luarca) $21,760.60 with interest from September 1, 1964, on its counterclaim to recover cargo's share in contribution to General Average. We affirm.

The plaintiff-appellant Mission, a purchasing agency of the Government of India, and the defendant-appellee Luarca, a Panamanian corporation which was the registered owner of the S.S. THEOKEETOR (substantially renamed S.S. MARU) entered into a voyage contract of Charter Party on June 21, 1963 for the transportation of bagged rice from Lake Charles, Louisiana to a safe port in India.

Pursuant to contract, a cargo of 10,203 long tons of rice was loaded on board the THEOKEETOR at the port of Lake Charles, Louisiana. She sailed on July 30, 1963 for a scheduled bunkering stop at Freeport, Grand Bahama Island, arriving on August 3, 1963. After taking on some 769 long tons of fuel and fresh water, the vessel waited a day because of hurricane threats, and then sailed from Freeport at 1810 hours on August 4, 1963. At 1835 hours, while headed on a course of 305°, the vessel began to

vibrate and ran hard aground in approximately 24 feet of water. The master unsuccessfully attempted to free the ship using her own engines. Some 784 long tons of fuel were transferred to a lighter, and 200 long tons of fresh water were discharged in an effort to free the ship by lightening it. Two tugs were employed in a further effort to pull the ship free. All of this was to no avail and on August 8, 1963 the master of the THEOKEETOR signed a Lloyds "no cure-no pay" salvage contract with a representative of a professional salvor, Merritt-Chapman & Scott. Between August 13th and August 15th some 511 tons of rice were discharged to another vessel under the salvor's direction. With great difficulty, using 5 and eventually 8 beach gears, ships winches and a salvage boat, the THEOKEETOR was pulled free and refloated on August 15, 1963 after a week of strenuous assistance by the professional salvor. She eventually completed her voyage and discharged her cargo on September 30, 1963 in India.

The legal position of the plaintiff shipper below was that the stranding, which caused the cargo damage, the salvage and General Average expenses, was due to the unseaworthiness of the vessel which was overloaded and carried obsolete navigational charts of the area of the stranding. The position of the defendant shipowner was that the stranding was solely due to a neglect or error in navigation by the master which is an excepted peril under 46 U.S.C. §1304(2)(a) (COGSA).

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of this ship;

". . . ."

The charter party here incorporated COGSA and also included a New Jason Clause[1] which obligated the shipper to pay salvage costs attributable to cargo as well as General Average expenses.[2]

The burden of proof is clearly on the defendant shipowner to establish that the stranding and consequent damages

---

[1] "NEW JASON CLAUSE:

"In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the Carrier is not responsible by statute, contract or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

"If a salving ship is owned or operated by the Carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers. Such deposit as the Carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the Carrier before delivery."

[2] In this case the salvage award to the salvor was fixed pursuant to arbitration at the sum of $160,000. Plaintiff was obligated to pay its proportionate share ($146,072.64) in order to prevent the salvor's assertion of a lien on the cargo. The additional General Average contribution of cargo ($21,760.60) which was not paid and which is sought by counterclaim of the defendant shipowner entailed salvage expenses not owing to the professional salvor but incurred in the initial efforts of the vessel to free itself from the stranding. There is no dispute as to the amount of these awards or their apportionment.

were due to the excepted cause of negligent navigation by the master. *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426 (2d Cir. 1963); G. Gilmore & C. Black, The Law of Admiralty §3-43, at 162-63 (1957). We agree with the finding of the court below that the defendant has discharged its burden of proof. The master's testimony was that he did not check any chart in setting his course; that he navigated without a pilot, and that he depended upon his knowledge of the waters, making visual observations and heading on an angle with Holmes Cay which he could see ahead. The master testified:

> "I knew by estimation, seeing outside; outside, I mean, the land. And I maneuvered the ship by estimation, without plotting the course for positions from the chart."

Although this type of navigation might have the virtue of simplicity, it resulted in the THEOKEETOR's running hard aground about a mile from shore.

The shipper has urged that the ship was unseaworthy because its charts of the Grand Bahama Island area were published in December 1939 and brought up to date only to November 25, 1944. It is not disputed that the chart was almost 20 years old and inaccurate. For this reason the vessel was unseaworthy as found by the lower court. *Farr* v. *Hain S.S. Co.,* 121 F.2d 940, 945 (2d Cir. 1941); *The Maria,* 91 F.2d 819, 824 (4th Cir. 1937). This however does not end inquiry. Where the carrier has brought itself, as in this case, within the excepted peril of negligent navigation, the burden then shifts to the cargo owner to establish that the unseaworthiness caused the damages sought.

"Therefore once the carrier has brought forth evidence establishing the defense of error in management the burden is on the shipper to show that the ship was unseaworthy and that the damage was caused by such unseaworthiness." *Firestone Synthetic Fibers Co.* v. *M/S Black Heron*, 324 F.2d 835, 837 (2d Cir. 1963).

We agree that this burden was not sustained. The chart was obviously inaccurate since on August 5, 1963, the day after the strand, the master plotted his position on the chart and according to it he was in some 120 feet of water. The chart moreover was faulty in other respects such as the location of a lighthouse which had been moved since 1944 and it even showed an erroneous configuration of the island. However, the trial court found that the master had not relied upon the chart but was sailing solely by visual observation hence the chart could not have possibly been the cause of the strand. We agree therefore with the finding that the master's negligence in navigation was the cause of the strand.[3]

A somewhat stickier problem arises as to the shipper's claim that the vessel was unseaworthy by reason of overloading in violation of the Load Line Act, 46 U.S.C. §§85-85g. The lower court found that the THEOKEETOR was overloaded when she began her voyage at Lake Charles.

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[3] Although the "clearly erroneous" test of 52(a) Fed. R. Civ. P. does not apply to findings of negligence or lack of negligence, the conclusion of the District Court judge will ordinarily stand unless the lower court "manifests an incorrect conception of the applicable law." *In re Vessel Marine Sulphur Queen*, slip op. 2779, 2790 (2d Cir., April 25, 1972); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 813 (2d Cir. 1971); *Cleary* v. *United States Lines Co.*, 411 F.2d 1009, 1010 (2d Cir. 1969); *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F.2d 774, 776 (2d Cir.) *cert. denied*, 385 U.S. 835 (1966).

Her mean draft at that time, according to the stowage plan, was 28′ 7½″ which exceeded the prescribed salt water draft of 27′ 09″, by some 10½ inches. The lower court accepted the evidence of plaintiff's expert that her displacement at the time of stranding (after she had taken on bunkers of fuel and fresh water) was 14,915 long tons which, at a submersion rate of 48.5 long tons per inch, would indicate a draft of 28′ 10″. The lower court concluded she was overloaded by some 670 long tons and was 13 inches deeper in the water than she should have been. We cannot characterize this as a clearly erroneous finding. While the computation was based on the immersion scale of a standard five hatch Liberty ship and there was some evidence that the THEOKEETOR had minor modifications, the defendant offered no contrary evidence and the estimate, although admittedly approximate, must be accepted. The relationship between the overloading and the strand therefore becomes crucial. Since the THEOKEETOR went aground in water about 24 feet deep she would, in any event, have gone aground if she had drawn only 27′ 09″ of water. This fact does not appear to be seriously contended. Plaintiff shipper's main arguments are twofold—first, that the overloading made the vessel more difficult to maneuver. When she began to vibrate, it is urged that the vessel could have been steered away from the strand but for the overloading. The testimony of the master which is uncontradicted, refutes this contention. The period of vibration was only momentary before the vessel hit hard aground. There was no time and, in fact, absolutely no effort was made to change the course which the master had directed the helmsman to steer. Hence the

shipper's argument is purely hypothetical and not convincing in light of the master's testimony.

The second contention of the shipper is that the overloading made the use of the professional salvor necessary—if the vessel had been loaded within the allowable limit, the argument runs, she could have been lightened and refloated by the use of the tugs and the lighter employed before the expensive salvage operation commenced. Plaintiff's argument is based upon the contention that although 784 long tons of fuel and 200 long tons of water had been removed prior to the employment of the professional salvor, the salvor only had to remove 511 long tons of cargo before the vessel was refloated. The plaintiff argues that if the vessel had not been overloaded by some 670 tons, or 159 tons in excess of the 511 tons of cargo which the ship was required to discharge, it could have been refloated merely by discharge of the 984 long tons of fuel and water, without having to employ a salvor.

Plaintiff urges on appeal that the lower court erroneously found that the 984 tons of bunker fuel and water were removed after the salvor had been hired and therefore it missed the significance of the salvor's removing only 511 tons of cargo. The paragraph in which the alleged erroneous finding of fact appears does not purport to be a precise statement of the time schedule of the lightening operations. The language employed is ambiguous and could be susceptible of the interpretation drawn by the shipper.[4] However,

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[4] "The Theokeetor was finally floated, after considerable difficulty on August 15, 1963 with the aid of a salvage tug, the Cable, owned by Merritt-Chapman & Scott Corp., with whom the master signed a 'no cure-no pay' salvage agreement on August 8, 1963. Before this could be accomplished, it was necessary to lighten the vessel by transferring fuel to a lighter and part of her cargo to another ship." Query does "Before" refer to August 8th or August 15th?

there is no indication that the trial court was at all confused as to the sequence of events, as a reading of the entire record and the judge's questioning of counsel and the witnesses clearly establishes. Aside from this, the court found as a fact that the vessel ran "hard aground" and that she was freed only after considerable difficulty. "The prolonged operations that were required to float the ship, as disclosed by the testimony, show that the vessel was stuck very fast." A reading of the deck log extracts of the THEOKEETER amply demonstrates that refloating the vessel required seven days of complicated extrication efforts using a salvage vessel, 8 beach gears and ships winches before the ship even budged. In fact, the vessel was not refloated until her mean draft was reduced to 26' 04" or 17 inches less than the prescribed 27' 09". The survey report, which is in evidence, indicated 14 items of damage to the vessel as a result of the stranding, with repairs estimated at $76,485. In view of this evidence the finding of the court below that simple overloading was not the cause of the expense of unstranding, is fully supported by the record.

The lower court held that the defendant had the burden of establishing that the overloading was not the cause of the stranding. As we have pointed out, the burden of establishing unseaworthiness and that the damage was caused by such unseaworthiness is on the shipper (*Firestone Synthetic Fibers Co.* v. *M/S Black Heron,* 324 F.2d 835, 837 (2d Cir. 1963)). However, the plaintiff successfully maintained below that since the ship was overloaded in violation of the Load Line Act, the *Pennsylvania* rule applied. In *The Pennsylvania,* 86 U.S. (19 Wall.) 125, 136 (1874) the Supreme Court stated:

> "But when . . . a ship at the time of a collision is in actual violation of a statutory rule *intended to prevent collisions,* it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis added).

Even applying the *Pennsylvania* test, the court below found that the overloading could not have had anything to do with the stranding,[5] finding that the sole cause of the mishap was an error of navigation. While this finding is supportable, we cannot agree that the *Pennsylvania* rule is applicable.

Although the *Pennsylvania* rule is not now limited to collision cases (*In re Seaboard Shipping Corp.*, 449 F.2d 132, 136 (2d Cir. 1971), petitions for cert. filed, 40 U.S. L.W. 3384, 3369 (U.S. Jan. 12, 1972 and Feb. 2, 1972) (Nos. 913 & 981); but see *Wilkins* v. *American Export Isbrandtsen Lines, Inc.*, 446 F.2d 480, 485-86 (2d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3315 (U.S. Jan. 10, 1972), we are not inclined to apply it here. It has been properly characterized as a "drastic and unusual presumption" G. Gilmore & C. Black, The Law of Admiralty §7-5, at 404

[5] The only witness to testify that had the vessel not been overloaded it could have been refloated without a professional salvor, was admittedly not an expert on salvage operations and his opinion was not accepted by the trial court. However, the shipowner introduced no testimony at all on this point.

(1957).[6] The rule, as articulated by the Supreme Court, was limited to the violation of a statute intended to prevent the catastrophe which actually transpired.

The prime motivation of the initial load line legislation in Britain, which was sponsored by Samuel Plimsoll, M.P., was to save the lives of seamen. "The interest of shipowners led them, in early times, to load vessels to a point beyond safety; the greater the weight of the vessel's load, of course, the lower she rides in the water, and the more vulnerable she is to heavy seas. Many seamen consequently lost their lives."[7] The maintenance of adequate freeboard

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[6] Although we find that *The Pennsylvania* rule by its own terms is not applicable in this case, it is in my view (as to which Judge Mansfield takes no position) an anomaly which is no longer supportable. Where COGSA rules of burden of proof would be otherwise applicable, there is no reason to apply *The Pennsylvania*. The burden of proof rules in COGSA represent a studied statutory scheme in a difficult area. (See *Lekas & Drivas, Inc.* v. *Goulandris*, 306 F.2d 426 (2d Cir. 1962); *CIA. Atlantica Pacifica, S.A.* v. *Humble Oil & Refining Co.*, 274 F.Supp. 884 (D. Md. 1967); G. Gilmore & C. Black, The Law of Admiralty §3-43, at 162-63 (1957); Comment, Cargo Damage at Sea: The Ship's Liability, 27 Texas L. Rev. 525 (1949)). Marine safety statutes should be enforced irrespective of loss and whatever sanctions they provide should be exacted where violated. However, to utilize their breach for the imposition of a drastic burden of proof rule, is in my view illogical and inequitable. The unequal bargaining power of the ship owner which created the predictable inequities of the contract of adhesion, have been remedied in large measure by COGSA. Hence where it is applicable, the *ad hoc* judicial spleen of *The Pennsylvania* (which predated even the Harter Act) provides in my view a punitive response no longer necessary.

[7] G. Gilmore & C. Black, *supra* note 6, §11-12, at 779. See also C. R. Benstead, Shallow Waters 385 n. 1 (1958) "A ship's load-lines or Plimsoll marks are placed so as to give her adequate freeboard, and therefore buoyancy, in any weather she is likely to meet"; and W. Winter, Marine Insurance 75 (3d ed. 1952) A vessel, loaded to capacity, "would not be seaworthy, because the least additional weight, such as that of a wave breaking on the deck, would cause the vessel to sink . . . ."

(a measure of reserve buoyancy) assured greater maneuverability of stability and in heavy seas minimized the danger to life and limb of the seamen on deck or damage to or loss of cargo.[8] Obviously the lower the ship is in the

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[8] A reading of the Congressional debates shows that in enacting the first American load-line legislation for ocean-going vessels, the prime concern of the legislators was the sinking of ships on the high seas during storms. Exceptions from the load-line laws were sought for timber schooners and ships engaged in the coastwise trade. The argument in favor of exempting the former was that the schooners were virtually unsinkable, 70 Cong. Rec. 3793 (remarks of Representative Welsh), 3973 (remarks of Representative Johnson) (1929). The reason for exempting ships in the coastwise trade was given by Senator Copeland:

> "You can see, Mr. President, that how much load a ship can carry makes a great difference in its position upon the seas. If the vessel is all the time near shore, and in time of storm or stress at sea may scurry to cover, it can carry a heavier load. It is proper for it to carry a heavier load, because if storm approaches it can go to a safe haven. On the other hand, where a vessel is going out upon the wide expanses of the ocean, we must make certain that the vessel is not overloaded or sailing under conditions which may make for disaster. If any Member of the Senate has been in a storm at sea, he knows how terrifying it is, and what the conditions are." 70 Cong. Rec. 4829-30 (1929)

Ships operating in the intercoastal trade were exempted from the 1929 legislation—though certainly vessels operating close to shore are more prone to the hazard of stranding than their ocean-going counterparts.

While Representative La Guardia alone did make some general references to strandings in his discussion of the load-line legislation, his main reason for supporting the law, like that of the bill's other supporters, was to protect ships from sinking. "In the face of these figures [Coast Guard statistics on the loss of lives and property in American waters from 1924 to 1928, e.g., 'in 1927 on the Great Lakes the total losses were 7 ships foundering, 5 stranded, 1 collision, and 7 attributed to other causes'], in the face of the hundreds of lives lost every year, in the face of the hundreds of ships that *founder,* there is not a man on the floor of this House who can stand up and say that overloading a ship is not a contributing factor to the loss of the ship." 70 Cong. Rec. 3962-63 (1929) (emphasis added).

water, the more likely it will run aground in shallow waters, however, stranding in these circumstances would be primarily due to negligent navigation. On the other hand, lack of maneuverability and inadequate freeboard in heavy seas is clearly hazardous to crew and cargo, and the danger cannot be avoided by navigational skills. Appellant has not cited, and we have not found, any case where stranding due to overloading has called for the application of the *Pennsylvania* rule. *Richelieu & Ontario Navigation Co.* v. *Boston Marine Insurance Co.*, 136 U.S. 408 (1890) did involve a stranding and the rule was applied but the statute violated was one which required a moderated speed in foggy conditions. The rule was disregarded and the ship ran aground on an island. Obviously the statute's purpose was to preclude this very misadventure. *Petition of Long*, 439 F.2d 109 (2d Cir. 1971) involved overloading which resulted in the sinking of the vessel causing the death of crewmen and the loss of cargo. The overloading there caused the starboard rail to be rapidly and permanently submerged. Cargo then listed reducing freeboard. This again was the very danger that load line legislation was designed to prevent.[9] To accept the theory that every viola-

[9] See also *In re Seaboard Shipping Corp.*, 449 F.2d 132 (2d Cir. 1971) (Overloading led to swamping of barge and two of the crew swept overboard). In *Andros Shipping Co., Ltd.* v. *Panama Canal Co.*, 298 F.2d 720 (5th Cir. 1962) there was overloading plus other statutory violations. The vessel sheered in the Panama Canal. The sheering was due to the overdraft of the vessel as well as other violations and the *Pennsylvania* rule was followed "The accident of the Andros Venture was of the sort that the safety statutes were designed to prevent . . . ." *Id.* at 728. In *The Denali*, 112 F.2d 952 (9th Cir.), *cert. denied*, 311 U.S. 687 (1940), the *Pennsylvania* rule was applied to a stranding but the statute violated involved overworking of the ship's crew which was aimed against the dangers of a weary navigator directing a ship.

tion of every safety statute would call into play the *Pennsylvania* rule irrespective of the purpose of the statute and the danger which it was intended to prevent, would in effect emasculate the burden of proof scheme of COGSA. Finding the rule not applicable we have no question but that the plaintiff shipper failed to carry its burden of establishing that the overloading caused the strand and the consequent damage to ship and cargo.

This leaves us with the question of plaintiff's claim for cargo damage in the amount of $6,234.11. Appellant urges that, having established delivery to the carrier in good condition, the burden of production then shifted to the carrier to show that the damage was caused by one of the excepted perils under COGSA. No proof was ever submitted by the carrier as to how the spoilage and shortage occurred and hence it is argued the lower court erred in dismissing this claim. We do not challenge appellant's statement of the law. However, the reason that the record is barren of evidence as to the cargo claim, is simply that the plaintiff treated all three as claims for damage resulting from the stranding. The record reveals that counsel for plaintiff, in his opening statement to the court, stated:

> "We are claiming, your Honor, that this stranding occurred by reason of the vessel being unseaworthy. If that allegation is correct, we claim, No. 1, we don't have to contribute because it is not a legitimate general average situation; we claim, No. 2, that any cargo loss or damages as a result of such stranding we can recover under the United States Carriage of Goods by Sea Act which is made applicable by the charter party; and thirdly, we claim that because the vessel

stranded as a result of an unseaworthy condition we were forced to pay to this third party an amount in the sum of approximately $146,000 . . . ."

Counsel for the plaintiff adhered to this theory in his closing remarks to the court:

"The Court: So you are claiming that this damage to cargo was caused by the unseaworthiness of the vessel?

"Mr. Meshel: Yes, caused during the stranding, and the stranding was caused by the unseaworthiness of the vessel.

"The Court: And that's the same claim you make with respect to the other two parts of it?

"Mr. Meshel: No question, it is all one ball of wax."

This accounts for the court's finding: "The master testified that on arrival in India, some of the cargo was damaged. Presumably this occurred during the transfer of part of the cargo from the Theokeetor to another vessel in order to lighten the ship."

Having taken the position below that the liability for cargo damage was on precisely the same footing as the claim to recoup salvage costs, whatever error is alleged now was induced by appellant's position below and hence it cannot complain. See *Remington Rand, Inc.* v. *United States,* 202 F.2d 276 (2d Cir. 1953).

Affirmed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of April one thousand nine hundred and seventy-two.

Present:

HON. PAUL R. HAYS,
HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

Director General of India Supply Mission for and on behalf of the President of the Union of India,

Plaintiff-Appellant,

v.

SS MARU (ex RIVERHEAD, ex THEOKEETOR), her engines, boilers etc., and LUARCA CIA, Nav, S.A.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

Opinion of the District Court

[Footnotes by the Court]

McLean, D. J.

This suit in admiralty arises out of the stranding of the S.S. Theokeetor, which, at about 6:35 P.M. on August 4, 1963, in daylight and in reasonably good weather, ran aground off Grand Bahama Island, approximately three miles northwest of Freeport, in latitude 26° 32′ north, longitude 78° 50′ west. The Theokeetor was a Liberty ship of 7,252 gross tons owned by defendant Luarca Cia Nav. S.A., a Panamanian corporation, of Liberian registry, with a Greek crew. On June 21, 1963, plaintiff had chartered her under a voyage charter for a voyage from Lake Charles, Louisiana, to India. She was loaded with a cargo of bagged rice weighing 10,203 long tons. She sailed from Lake Charles on July 30, 1963, and called at Freeport to take on fuel. Within a few minutes after leaving Freeport on August 4, 1963, she ran hard aground in approximately 24 feet of water.

The Theokeetor was finally floated, after considerable difficulty on August 15, 1963, with the aid of a salvage tug, the Cable, owned by Merritt-Chapman & Scott Corp., with whom the master signed a "no cure-no pay" salvage agreement on August 8, 1963. Before this could be accomplished, it was necessary to lighten the vessel by transferring fuel to a lighter and part of her cargo to another ship. She eventually completed her voyage to India and discharged her cargo there on September 30, 1963.

On January 22, 1965, plaintiff filed its libel and complaint in this court in which it alleged that some of the

cargo was damaged during the voyage, causing a loss to plaintiff of $7,000.* On February 7, 1968, plaintiff filed an amended complaint adding a third count in which plaintiff alleged in substance that plaintiff was obliged to give to the salvors an undertaking to pay to them plaintiff's proportionate share of the salvage award, that plaintiff ultimately paid its share and that defendant is liable to reimburse plaintiff for the sum so paid. Defendant has denied all liability and has filed a counterclaim to recover plaintiff's proportionate share of a general average adjustment of expenses other than salvage, which plaintiff has not paid.

The parties have stipulated that the court shall determine only the issue of liability and that if the court finds that defendant is liable for the cargo damage, the determination of the amount of such damage shall be referred to a master. There is no dispute, however, as to the amount of plaintiff's proportionate share of the salvage or of the general average adjustment. As to these, the only issue is as to liability.

Two defenses asserted by defendant may be disposed of at the outset. Defendant contends that the claim for cargo damage is barred by the one-year statute of limitations. 46 U.S.C. §1303(6). The evidence shows, however, that defendant expressly agreed in writing to extend plaintiff's time to sue for this damage until February 12, 1965. The action to recover that damage was begun before that date, *i.e.*, on January 22, 1965. There is thus no merit in this defense.

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* In the pre-trial order this claim was reduced to $6,234.11.

Defendant also contends that plaintiff's claim for reimbursement of the amount paid by plaintiff as its share of the salvage is barred by laches. This claim was first asserted by plaintiff in its amended complaint filed on February 7, 1968. The amount of plaintiff's share was determined by the arbitrator on May 25, 1966. It came to $146,072.64. Plaintiff paid this sum in March 1967. Plaintiff asserted this claim within some eleven months thereafter, which is not an unduly long delay.

Moreover, there is no substance to defendant's claim that it has been prejudiced by whatever delay there was. Defendant sold the Theokeetor in 1964. In 1965, according to defendant's precedent, defendant destroyed the "voyage files and vouchers." At the time, defendant's president knew of plaintiff's claim for cargo damage. He also knew that there would eventually be a salvage claim and a general average claim. To destroy records under these circumstances was an improvident act which defendant performed at its own risk.

Furthermore, it does not appear that the destruction of the voyage files and vouchers, whatever they were, has in any way hampered defendant in its defense. The master of the vessel was available and testified at length by deposition. The chart which was aboard the vessel at the time, which has been the subject of much discussion at the trial, was preserved and was marked in evidence. Although the vessel's original logs, in Greek, are apparently missing now, the master of the vessel made English translations of them shortly after August 4, 1963. These translations were used at his deposition taken in May 1970 and numerous extracts from the logs are contained

in the general average statement. These translations are adequate for our purpose and there is no need for the Greek originals. There has been no showing of any prejudice to defendant because of missing records. The defense of laches has no validity.

I turn now to the merits of the controversy. The Carriage of Goods by Sea Act, which applies to this case, provides that a carrier shall be bound to exercise due diligence to make the ship seaworthy. 46 U.S.C. §1303. Plaintiff claims that the Theokeetor was unseaworthy in two respects: (1) the chart which she carried of the region in the vicinity of Grand Bahama Island was outdated and inaccurate; (2) the vessel was overloaded. I will consider these contentions in order.

As to the first, there is no doubt that the chart on the Theokeetor was in fact outdated and inaccurate. It was Chart No. 26E published in December 1939. It bore a hand stamp notation to the effect that it had been corrected, in what respects does not appear, up to November 25, 1944. Comparison with a later chart reveals that this 1939 edition did not even depict a proper configuration for Grand Bahama Island itself, the principal land mass in the area. Moreover, it showed a location for Pinder Point Lighthouse, the main light in the region, which, as of August 1963, was wrong by a matter of several miles. The light had been moved between 1944 and 1963, which accounts, in part at least, for the error. Finally, the data as to soundings and depth of water adjacent to the shore of the island as shown on this chart was less complete, and in some respects different, from that shown on the more modern chart.

It is also clear that defendant did not use due diligence to see to it that the Theokeetor was provided with an up-to-date chart. Before beginning her voyage from Lake Charles, the ship's officers checked to see whether the ship had charts for the various areas through which the ship would pass in the course of the voyage. As the master testified:

> "So the officers, sometime with my cooperation, we look on the map which charts we need, which numbers. And then we look on our book if we have these numbers. That's all."

Such a check could have revealed only that the ship carried a chart number 26E for the Grand Bahama Island area. It could not have indicated that this chart had been superseded by a more recent one. Until after the stranding, the master seems to have been completely oblivious of the fact that the chart was so old and inaccurate as to be practically worthless.

I conclude that the vessel was unseaworthy by virtue of the fact that she carried only an inadequate chart. This conclusion, however, does not dispose of the problem. It must still be determined whether this unseaworthiness was the cause of the stranding. On this issue, the burden of proof is on defendant, at least as to plaintiff's claim for cargo damage.

Plaintiff proved that the cargo was delivered to the vessel at Lake Charles in good order. The bill of lading so states. The master testified that on arrival in India, some of the cargo was damaged. Presumably this occurred during the transfer of part of the cargo from the

Theokeetor to another vessel in order to lighten the ship. Proof of these facts casts the burden upon defendant to prove that the damage was caused, not by the unseaworthiness, but by one of the excepted causes mentioned in 46 U.S.C. §1304.*

Lekas & Drivas, Inc. v. *Goulandris*, 306 F. 2d 426 (2d Cir. 1962).

One of these excepted causes is "act, neglect, or default of the master * * * in the navigation or in the management of the ship." Another is "perils, dangers, and accidents of the sea * * *."

Both sides seem to assume that the same principle as to burden of proof applies to plaintiff's claim for reimbursement of the salvage expenses. I see no reason why it should not. I will therefore draw no distinction between the two claims in this respect.

The question thus is whether defendant has discharged the burden of proof. I think that it has. I am satisfied that the inaccurate chart was not the cause of the stranding because the master never looked at it before the vessel ran aground. Navigating without a pilot, the master relied, not on the chart, but on what he believed to be his knowledge of those waters, a knowledge that proved to be faulty. He used only visual observation of his surroundings. After leaving the harbor, he set the ship's heading to be on an angle with Holmes Cay, which he could see about four miles ahead. He told the quartermaster to keep on that course, a course of 305.° As he testified:

* The substance of Section 1304 was incorporated as one of the terms of the charter party.

> "I knew by estimation, seeing outside; I mean, the land. And I maneuver the ship by estimation, without plotting the course for positions from the chart."

The quartermaster kept to the course, as directed, until the ship ran hard aground.

On the following day, August 5, the master got out the chart, plotted his position on it by taking bearings on the lighthouse and on Holmes Cay, and discovered that according to the chart, he should be three-quarters of a mile from the 20 fathoms curve, *i.e.*, in something close to 120 feet of water. Since he obviously was not, he concluded that "something must be wrong" with the chart. He testified:

> ". . . it seems to be funny how my charts show me in such a depth, and the fact was that I was aground."

I find and conclude that the unseaworthiness of the vessel by virtue of the fact that the chart was inadequate was not the cause of the stranding or of plaintiff's damage.

I turn now to plaintiff's second claim, the overloading. The problem here is somewhat more complex. It involves computations made by plaintiff's expert upon the basis of the data disclosed by the evidence. The vessel's mean draft when she was finally floated on August 15, 1963, was 26′ 04″. According to an immersion scale for standard Liberty ships published by the United States Maritime Commission, her displacement at this draft would be 13,420 long tons. By adding to this the weight of the

material which the vessel carried at the time of stranding and which was later discharged in order to lighten her, *i.e.*, 784 long tons of fuel, 200 long tons of water, and 511 long tons of cargo, the expert concluded that her displacement at the time of stranding was 14,915 long tons which, at a submersion rate ("TPI") of 48.5 long tons per inch, indicated that her draft was 28′ 10″. The expert testified that the vessel's proper maximum summer saltwater draft, according to the standards of the American Bureau of Shipping, should have been 27′ 09″ and her maximum displacement should have been 14,245 long tons. Hence she was overloaded at the time of stranding by 670 long tons and she was 13 inches deeper in the water than she should have been.

While these computations may not yield a precisely correct result, they appear to be reasonably accurate and no evidence was offered to rebut them. I feel required to accept them and to find that the vessel was overloaded to the approximate extent indicated by this testimony at the time of the stranding. This was an unseaworthy condition. Defendant has offered no evidence to prove that it used due diligence to prevent this condition, which, under 46 U.S.C. §1304, defendant was obligated to do.

It remains to determine whether this condition was the cause of the stranding. Here, as in the case of the faulty chart, the burden of proof is on defendant. Indeed, as to this claim, plaintiff maintains that defendant has an even heavier burden, *i.e.*, to prove that the overloading was not even a contributing or concurrent cause of the mishap.

The Pennsylvania, 86 U.S. 125 (1874).

This is on the theory that the overloading was a violation of a statute, the Load Line Act, 46 U.S.C. §85, *et seq.* That statute provides that load lines shall be established for merchant vessels of 150 gross tons or more loading at or proceeding to sea from any part within the United States for a foreign voyage. Contrary to defendant's contention, the statute does not appear to be limited to American flag vessels, at least as far as American ports are concerned. The load line is to be marked on the vessel. Section 85b provides in substance that it shall be unlawful for any vessel subject to this statute to depart from any United States port without bearing such a mark. According to the testimony, the load line of this vessel was 27′ 09″.

It will be noted that this statute in effect prohibits overloading at the United States port at which the foreign voyage begins. The testimony of plaintiff's expert heretofore referred to showed only that the vessel was overloaded at the moment of stranding after she had called at Freeport to take on fuel. Since Freeport is not a United States port, and since the Theokeetor was not an American vessel, defendant challenges the applicability of the statute.

It is unnecessary to determine this question because there is evidence to show that the Theokeetor was overloaded, at least to a considerable extent, when she began her voyage at Lake Charles. Her stowage plan shows her draft forward as 27′ 10″ and aft as 29′ 05″, a mean draft of 28′ 7½″. This exceeded her prescribed draft of 27′ 09″ by 10½ inches. There was thus a violation of the Load Line Act at the beginning of the voyage and an unseaworthy condition existing then, which seems to have become somewhat worse after her call at Freeport.

Was this condition a contributing cause of the stranding? Since the water at the spot where the Theokeetor went aground was only about 24 feet deep, it is apparent that she would have hit bottom anyway, even if she had drawn only 27′ 09″ of water. The plaintiff's expert voiced the opinion that if the vessel had not been overloaded, the master, when he noticed warning vibrations immediately before the grounding, could have changed the vessel's course and avoided the impact. The expert said in substance that the fact that the vessel was deeper in the water than she should have been made her harder to turn.

The fact is, however, that the master made no effort to change course. The vessel was proceeding at a speed of 10 knots. The interval between the first vibration and the grounding was very short. Before the master realized what was happening, she was aground. Any greater maneuverability which the vessel might have had if she had been lighter is immaterial because the master never attempted to maneuver her. As far as appears, the idea did not occur to him.

Plaintiff's expert also expressed the opinion that if the vessel had not been overloaded, she could have freed herself without the aid of a salvage tug, thereby saving the expense of salvage. Admittedly this witness was not an expert on salvage operations, hence his views on this question have little probative value. The prolonged operations that were required to float the ship, as disclosed by the testimony, show that the vessel was stuck very fast. Indeed, she was not refloated until her mean draft was reduced to 26′ 04″, *i.e.*, 17 inches less than the 27′ 09″

permitted by the Load Line Act. I see no reason to believe that at her maximum permissible draft she could have saved herself without professional salvage assistance.

Plaintiff relies heavily on *Petition of Long,* 439 F. 2d 109 (2d Cir. 1971), which also involved an overloaded vessel which began her voyage at a United States port and took on fuel at Freeport, Bahamas. After leaving Freeport, she ran into heavy seas and eventually sank. The Court of Appeals held that the District Court had properly denied the petition of the vessel owner for limitation of liability. It held that petitioner did not prove that the statutory fault, *i.e.,* the overloading, could not have been a contributing cause of the disaster.

This decision supports plaintiff's legal contention as to the nature and extent of defendant's burden of proof, but it is of no help to plaintiff on the facts, because the facts of each case are different. In *Long,* the vessel's cargo shifted, causing her to list heavily, take on water, and eventually to sink. There was expert testimony to the effect that her lack of adequate freeboard, due to the overloading, reduced her ability to right herself. Petitioner's evidence as to the shifting of the cargo "only pointed up the danger of any reduction in the vessel's freeboard." 439 F. 2d at 113. Petitioner therefore did not meet its burden.

In the present case, on the contrary, there is no evidence which I credit to show that the overloading had anything to do with the stranding. The sole cause of this mishap was an error of navigation on the part of the master. The evidence demonstrates this to my satisfac-

tion. Defendant has thus met the burden of showing that the overloading was not a contributing cause.

It follows that defendant is entitled to judgment dismissing plaintiff's action and awarding defendant judgment on its counterclaim in the sum of $21,760.60, with interest thereon from September 1, 1964.

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

The Clerk is directed to enter judgment in accordance with this opinion.

So ordered.

EDWARD C. McLEAN
U.S.D.J.

Dated: November 3, 1971

Judgment of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 AD. 85

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Honorable Edward C. McLean, United States District Judge, on October 12 and 13, 1971, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on November 4, 1971, having handed down its opinion, constituting its findings of fact and conclusions of law, awarding the defendant judgment on its counterclaim and dismissing plaintiffs action and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED AND DECREED: That the defendant, Luarca Cia Nav. S.A., have judgment against the plaintiff, Director General of the India Supply Mission for and on Behalf of the President of the Union of India, in the amount of $21,760.60 with interest thereon from September 1, 1964 on its counterclaim and dismissing the complaint.

Dated: New York, N. Y.
November 4, 1971

JOHN LIVINGSTON
Clerk

Order Denying Petition for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DIRECTOR GENERAL OF INDIA SUPPLY MISSION FOR AND ON BEHALF OF THE PRESIDENT OF THE UNION OF INDIA,

Plaintiff-Appellant,

v.

SS MARU (ex Riverhead, ex Theokeetor), her engines, boilers, etc., and LUABCA CIA, NAV, S.A.,

Defendants-Appellees.

A petition for a rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

June 2, 1972

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DIRECTOR GENERAL OF INDIA SUPPLY MISSION FOR AND ON BEHALF OF THE PRESIDENT OF THE UNION OF INDIA,

Plaintiff-Appellant,

v.

SS MARU (ex Riverhead, ex Theokeetor), her engines, boilers, etc., and LUARCA CIA, NAV. S.A.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

June 2, 1972

PAUL R. HAYS
U.S.C.J.

WALTER R. MANSFIELD
U.S.C.J.

WILLIAM H. MULLIGAN
U.S.C.J.

COPY

FILED
NOV 30 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-364

DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION FOR AND ON BEHALF OF THE PRESIDENT OF THE UNION OF INDIA,

Petitioner,

against

S.S. MARU (ex RIVERHEAD, ex THEOKEETOR), HER ENGINES, BOILERS, ETC., AND LUARCA CIA NAV. S.A.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

against

S.S. MARU (ex RIVERHEAD, ex THEOKEETOR), HER ENGINES, BOILERS, ETC., AND LUARCA CIA NAV. S.A.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Did the Second Circuit Court of Appeals properly hold that where a private contract of carriage incorporates the Carriage of Goods by Sea Act, 46 U.S.C.A., 1300 *et seq.*,

the presumptions of fault and burdens of proof contained therein should not be superseded by legal presumptions and statutes unrelated to the casualty in suit?

Statutes Involved

1. The United States Load Line Act (46 U.S.C. §85, *et seq.*) provides in part:

> "§85c. *Vessels so loaded as not to submerge lines or marks*
>
> It shall be unlawful for any vessel . . . to be so loaded as to submerge, in sea water, the load line or lines marked pursuant to said sections and to the regulations established thereunder applicable to her voyage; or so as to submerge under like conditions the point where such load line or lines ought to be marked pursuant to the provisions of said sections and of the regulations established thereunder; or so as in any manner to violate the said regulations."

2. The United States Carriage of Goods by Sea Act (46 U.S.C.A. §1304) provides in part:

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the

carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

* * *

(c) Perils, dangers, and accidents of the sea or other navigable waters;

* * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Statement

This litigation concerns the stranding of respondent's vessel, the THEOKEETOR, off Grand Bahama Island while on voyage charter to petitioner, under a contract which incorporated the Carriage of Goods by Sea Act. (COGSA).

Following departure from Freeport Harbor on August 4, 1963, the vessel proceeded for about 25 minutes at a speed of 10 knots before suddenly grounding on an unmarked sand shoal. After partially off-loading cargo and bunkers, and setting up an extensive arrangement of anchors, cables and winches, professional salvors finally pulled the

THEOKERTON free eleven days after she had stranded. Cargo and bunkers were reloaded, and the voyage was completed without further incident.

Although the District Court found the vessel was unseaworthy in that her navigational chart for the Freeport area was not up-to-date and that she had sailed with an overdraft of 13 inches, the Court found and concluded that neither of these findings of unseaworthiness was causally related to the stranding. The out-dated chart was found to be irrelevant because the master had been following the established practice of navigating in that area by visual aids alone; the 13 inch overdraft was equally unimportant since even if the ship had been 13 inches lighter she still would have run hard aground and imbedded herself in almost four feet of sand*.

The Court therefore found and concluded that the sole cause of the stranding and the resultant cargo damage, salvage, and General Average expenses was the master's navigational error, an excepted cause under the contract of carriage. Petitioner's claims were dismissed, and the respondend was awarded judgment on its counterclaim for General Average contribution.

ARGUMENT

I.

There is no issue which requires the attention of this Court.

Under the guise of offering to help resolve a conflict between the Circuits, petitioner seeks further review of a decision which was unanimously affirmed by the Second Circuit Court of Appeals, and denied further review by that

*The ship's legal draft was 27' 9", and the water depth at the site of the strand was only 24 feet, a difference of 45 inches.

same court. The arguments presented by the petitioner here were fully considered by the Trial Court and the Circuit Court in reaching their decisions.

Petitioner erroneously alleges that contrary to the holding of the Fifth Circuit in a similar situation, the Second Circuit failed to follow the "Pennsylvania Rule" and presume the vessel at fault for violation of the Load Line statute. The short answer is that even if this Court should adopt petitioner's argument, it would make no difference here because the Second Circuit specifically stated:

> "Even applying the *Pennsylvania* test, the court below found that the overloading could not have had anything to do with the stranding, finding that the sole cause of the mishap was an error of navigation. While this finding is supportable, we cannot agree that the *Pennsylvania* rule is applicable" (10a).

In view of the foregoing, it is clear that petitioner argues a moot point, and for that reason alone, this petition should be denied.

II.

There is no conflict between the Fifth and Second Circuits.

Petitioner's chief reliance is on a Fifth Circuit decision, *Andros Shipping Co.* v. *Panama Canal Co.*, 184 Fed. Supp. 246, aff'd 298 F. 2d 720 (1962), which is claimed to be, "exactly opposite to the holding of the Second Circuit in the instant case." On the contrary, the facts in the *Andros* case are significantly distinguishable, and the Fifth Circuit decision is completely consistent with that now under review.

In the *Andros* case, a supertanker sheered and collided with a bank of the Panama Canal while transiting a narrow cut. In denying recovery for losses to the ship, the Court held there had been a failure to prove negligence of the Canal pilot. The evidence also established that the engine room was undermanned in violation of the Canadian Shipping Act, as a result of which engine room orders were improperly executed. Since the lack of proper engine room response had caused the ship to collide with the Canal bank, the Fifth Circuit stated in applying the Pennsylvania Rule:

> "the accident of the ANDROS VENTURE was of the sort that the safety statutes were designed to prevent . . .".

The Trial Court had also found other faults; altered logs, hull irregularities, inadequate power, poor rudder design, and overloading. This last fault was found to be directly related to the ship's ability to maneuver in the narrow Canal, and the Trial Court had held that this, too, required the application of the Pennsylvania Rule.

This rationale of limiting statutory fault to the danger it was designed to prevent, is precisely what was done in the decision below. The Second Circuit refused to accept petitioner's theory that every violation of every safety regulation should call into play the Pennsylvania Rule, irrespective of the purpose of the statute and the danger which it was intended to prevent.

The Second Circuit noted that the THEOKEETOS had no steering difficulties, and would have gone hard aground whether or not she had been 13 inches lighter in the water. Thus, even if the Pennsylvania Rule had been applied with respect to the Load Line Act, the presumptive fault was erased by this fact (10a). The Circuit Court then went on

to explain that application of the Pennsylvania Rule was unnecessary where the parties had already contracted that their rights would be determined under COGSA. Its reasoning was eminently sound, and in accordance with firmly established law.

COGSA contains positive requirements that the carrying vessel shall be seaworthy in all respects, properly manned, and entirely fit and safe to carry the cargo, 46 U.S.C.A. §1303. It also provides in Section 1304 that loss from unseaworthiness will be excused if due diligence was exercised to accomplish the foregoing requirements, but it specifically states that in all such instances,

> "the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section" (46 U.S.C.A. §1304(1)).

Stranding, fire, and other specific uncontrollable non-fault causes of loss are excused (46 U.S.C.A. §1304(2)(a to p); any other uncontrollable non-fault cause of loss can be excused under COGSA, but the burden of proving such cause is again laid squarely upon the carrier, 46 U.S.C.A. §1304(2)(q).

Applying this statutory order of proof to the present case, petitioner created a presumption of unseaworthiness by proving the strand; the vessel owner successfully rebutted by showing an excepted cause, i.e., an error in navigation. Petitioner then pointed to two areas of unseaworthiness—an outdated chart and a 13 inch overload—but it was unable to sustain the burden (common to every plaintiff) of causally relating the "faults" to the loss. *Commercial Molasses Co.* v. *New York Tank Barge Co.*, 314 U.S. 104. Instead, it tried to shift to the carrier the burden of proving non-causation. This was contrary to the statute incorporated in its contract, which had carefully prescribed all available presumptions.

III.

Intent of Congress.

Petitioner's unsupported statement respecting the Load Line Act, that strandings "were the very type of casualty that the Act sought to provide against" requires much more than an extraction of a single word from a major Congressional debate, and the conjuring of results which will never come to pass. Intentionally overlooked in this argument is that Congress had a clear purpose in passing the Carriage of Goods by Sea Act, to include the United States in that body of maritime nations which adopted the Hague Rules of 1921. The Hague Rules were designed to unify and standardize the principal provisions in ocean bills of lading, and in the area of carrier liability for all major maritime nations. Certainly it was not, or is not, the intention of Congress that this Act with such carefully tailored rules of responsibility, liability and presumptions, should be thrust aside in favor of special statutes which have been independently enacted by the various maritime powers for other purposes.

Petitioner ambivalently argues that the intent of Congress is immaterial, citing *Kernan* v. *American Dredging*, 355 U.S. 426, 438 (1958). However, the case is inapposite because this Court there applied the absolute liability provisions of the Federal Employees Liability Act, 45 U.S.C. §§51-60, as incorporated into the Jones Act, 46 U.S.C. §688. But in doing so, it distinguished the ordinary tort doctrine which is applicable to the case at bar:

> "Among the refinements developed by the common law for the purpose of limiting the risk of liability arising from wrongful conduct is the rule that violation of a statutory duty creates liability only when

the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred" (p. 438).

The decision of the Court below that the intention of the Load Line Act was to save the lives of seamen by providing adequate freeboard for stability is clearly supported by numerous treatises (Gilmore and Black, *The Law of Admiralty*, 162-3, 779 (1957)) public records (70 Cong. Rec. 3793, 4829-30), and common sense.

IV.

Second Circuit Decisions.

In a final makeweight effort to butress its position, petitioner alleges that a different panel within the Second Circuit reached a conflicting decision in *Petition of Long*, 439 F. 2d 109, 113 (2nd Cir. 1971); this despite the fact that both Courts below clearly distinguished the *Long* case. In *Long*, the vessel owner was petitioning to limit its liability pursuant to 46 U.S.C. §181 et. seq., after its overloaded vessel had foundered and sunk in heavy seas. The burden of proof was thus governed by the Limitation Statute, and the COGSA burden of proof provisions were not at issue. More significantly, the *Long* accident was precisely the type which the Load Line Statute was intended to prevent. There, the Court properly applied the Pennsylvania Rule and held that the vessel owner had not proven its right to limit.

CONCLUSION

Petitioner has made no showing that this decision is in conflict with any reported decision, or that there is any other reason why this Court should consider the matter. The petition should be denied.

Respectfully submitted,

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New York, New York
November 29, 1972